**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.**

**ORDER.**

Ramdev & anr. vs. The State of Raj. & ors.

S.B. Civil Writ Petition No.5274/2004
under Article 226 of the Constitution of India.

Date of Order: April 21, 2005.

**PRESENT**

**HON'BLE MR. PRAKASH TATIA,J.**

Mr. Sajjan Singh & Mr. K.R. Saharan for the petitioners.
Mr. N.S. Acharya for respondent no.4.

**BY THE COURT:**

**REPORTABLE**

Though much has been argued by the learned counsel for the parties on factual aspect of the matter but brief facts which are necessary for the purpose of deciding this writ petition are that the petitioner no.1 filed the suit for injunction before the civil court seeking relief of injunction against raising of construction by non-petitioner no.4 for which she sought permission for construction of building from respondent no.2 -Municipal Council, Bikaner. The plot of the petitioner and respondent no.4 are situated on the same road in same line. The petitioner no.1, in his suit also sought relief against compounding of illegal construction by the Municipal Council, Bikaner which respondent

no.4 is intending to raise. The petitioner placed on record copy of a map (Annx.1) and alleged that for the entire colony, a scheme was framed and it was provided in the map of the colony that there shall be set-back for each plot. According to the petitioners, respondent no.4 applied for grant of permission for raising construction under Section 170 of the Rajasthan Municipalities Act, 1959,( for short "the Act of 1959") upon which permission was granted to respondent no.4 by the Municipal Council, Bikaner but with restriction of leaving set-back. Respondent no.4, sought permission to raise construction of one building on two plots. The trial court since passed the interim order against respondent no.4 only and has not specifically restrained respondent no.2 from compounding illegal construction of respondent no.4, therefore, the respondent no.2 allowed the application of respondent no.4 for compounding construction in the set-back area by order dated 4.8.2004 despite the fact that the suit against compounding of the construction was pending before the civil court and the Municipal Council itself was party in the suit.

According to the learned counsel for the petitioner, in view of the law laid down by the Hon'ble Apex Court in the case of K. Ravdas Shenoy vs. The Chief Officers, Town Municipal Council, Udipi and others (AIR 1974 SC 2177) when the Municipal Authorities grants permission to raise

a construction on a building which materially affects the right to or enjoyment of the property by person residing in the residential area, the said action can be challenged. It is submitted that the scheme for planned development of the colony is framed for the benefit of the residents of the locality and rights of the residents in the area are invaded by an illegal construction in the locality. It is submitted that the act of nullifying the scheme of the Municipal Authorities can be prevented by issuing a writ against the Municipal Authorities. The learned counsel for the petitioner also submitted that the petitioner though sought relief of injunction against respondent-Municipal Council as well as the respondent no.4 by filing the civil suit but since respondent-Municipal Council, Bikaner has compounded the illegal construction of respondent no.4 during the pendency of the suit and the petitioner could not have challenged that order in the suit, therefore, despite pendency of the suit, the petitioner can pursue the remedy by filing the writ petition before this Court under Article 226 of the Constitution of India, otherwise, the petitioner's suit is likely to be affected adversely because of simple reason that the authorities have passed the order compounding the illegal construction of respondent no.4 and the trial court may proceed to rely upon the order of compounding till it is set aside and there may be difficulty for the petitioner to get the appropriate relief even against respondent no.4 till

the order of compounding remains in force. It is also submitted that the alternative remedy is no bar against the exercise of judicial discretion by the High Court but it is a restriction imposed by the courts themselves. According to the learned counsel for the petitioner, it is a fit case where this Court may exercise its discretion to entertain the writ petition to avoid the unnecessary litigation. It is also submitted that the petitioners will have to amend the suit to incorporate all those grounds on the basis of which the petitioners want to assail the order of compounding and all that exercise can be avoided if this Court examines the order of the Municipal Council.

The learned counsel for the petitioner also submitted that the Municipal Council in gross violation to the scheme applicable to the area in question and in gross violation to the Municipal Act and the bye-laws, passed the order to compound the illegal construction of respondent no.4 and thereby, they have nullify the provisions made for the benefit of the residents of the locality. It is also submitted that the order is per se illegal as well as is a non-speaking order inasmuch as the Municipal Authorities have not given any reason for compounding of the construction. The order under challenge is further illegal because it has been passed against the mandatory restriction imposed by sub-clause (iv) of Rule 4 of the Rules of 1966.

The learned counsel for respondent no.4 vehemently submitted that the writ petition of the petitioners deserves to be dismissed because of the several reasons without permitting the petitioners to submit their case on merit. According to the learned for the respondent no.4 , the petitioners with ulterior motive and malafidely, has chosen and picked up respondent no.4 only and knowing it well that the allegations which have been levelled against respondent no.4 and which are not correct according to respondent no.4, are the all breaches which have been committed by the petitioner himself as well as his brother Hullas and further purchaser of the property from petitioner's co-sharers in the same and adjoining area. According to the learned counsel for respondent no.4, there were total 12 plots of three brothers, Ramdev, Hullas and Atraram. Plot Nos.9,10,15 and 16 came in the share of Ramdev, Plot Nos. 11 to 14 came in the share of Hullas and Plot Nos. 7,8,17 and 18 came in the share of Atmaram. Plot Nos.17 and 18 were divided in two plots each and Plot Nos. 7 and 8 which were originally belonging to Atmaram and which were purchased by Smt. Pushpa Devi, are the plot in dispute. According the learned counsel for respondentno.4, the photographs placed on record by the respondent clearly show that the petitioner himself constructed a pukka construction without leaving any set-back and that fact has not been

denied by the petitioner. The petitioner himself also raised the construction without obtaining permission from the Municipal Council. The petitioner also even without getting compounding of the construction, raised construction over the plot in the same building line where respondent no.4 is raising construction.

The learned counsel for respondent no.4 further submitted that the petitioner deliberately concealed various material facts from this Court which were necessary in the facts of this case and also submitted wrong facts before this Court, therefore, also the writ petition of the petitioner deserves to be dismissed. It is also submitted that the order of compounding is in fact order of granting permission to raise construction and appeal lies against the order of grant of permission to raise construction under the provisions of the Act of 1959, therefore, the petitioner has effective alternative remedy under the Statute and therefore also, the writ petition of the petitioner deserves to be dismissed. It is also submitted that even if no appeal lies against the order of compounding the construction then the revision lies against the order.

The learned counsel for respondent no.4 vehemently submitted that the property in question has been purchased by the predecessor of

petitioner from the Gram Panchayat and in the grant/patta/title deed, there is no condition that the plot holder shall leave any set-back while raising construction over the plot. Therefore, the respondent is not under obligation to leave set-back in his property nor any condition can be put against the respondent to leave set-back It is also submitted that not only this but even there is no bye-law creating any obligation of the any land holder of free-hold land to leave the set-back from his own plot. According to learned counsel for respondent no.4, the property in question is absolute property of respondent no.4 and in view of the various judgments though delivered on the issue whether a person holding land not from the State Government, Municipality or local bodies, is liable to pay the conversion charges for raising construction of commercial building on the plot for which there is no restriction in the title deed but the same principle applies in this case also where any restriction sought to be imposed for leaving part of the land owned by the owner of the land. It is also submitted that as per the relevant law, i.e., the Transfer of Property Act, the respondent became absolute owner of the purchased land and directing the respondent to leave set-back in his property, amounts to deprivation of one from his property right.

The learned counsel for respondent no.4 further vehemently

submitted that the petitioner is relying upon the bye-laws, copy of which is placed on record as Annx.14, but even in those bye-laws which came in force in the year 1982, there is no provision for leaving the set-back. Learned counsel for respondent no.4 further submitted that clause (3) of Condition 28 of the bye-laws dated 15.12.1985 only provides that in case the plinth area shall be more than 500 miters then no permission beyond 500 miters shall be granted for raising construction. According to the learned counsel for the respondent no.4, this provision also nowhere provides that there shall be set-back area for the plot. It is also submitted that the above provisions cannot be implemented in any manner because by this, the owner of the property is sought to be deprived from enjoyment of his property right despite the fact that he is owner of the property of every inch of the land. It is also submitted that clause 3 of the Condition No.28 can even be said to be absurd provision as in case a person has 2000 miters of land, can there be a restriction of leaving 1500 miters of land as open land ? It provides that permission will be granted for 500 meters only, will it mean that one can raise construction covering all boundries by leaving open space within the plot ?

The learned counsel for respondent no.4 further vehemently submitted that the writ petition involves several disputed questions of

fact which can be gone into only in regular trial before the civil court and when once the petitioner has chosen that remedy then he cannot pursue the remedy in two courts; one before the civil court and another before the High Court under the writ jurisdiction.

Several authorities have been cited by both the counsels but I need not to refer all those authorities because of simple reason that the facts are not in dispute and the petitioner himself has filed the suit for the same relief which the petitioner is seeking by filing this present writ petition. It will be pertinent to mention here that this Court, while issuing notice to the respondents, relied upon the statement of the learned counsel for the petitioner that the petitioner has not challenged the compounding of the illegal construction of respondent no.4 in the suit and, therefore, this Court admitted the writ petition even after taking note of the fact of pendency of the civil suit because of the reason that according to the petitioner, the petitioner will not be able to get the relief from the civil court in the civil suit.

It appears from the copy of the suit, which has not been filed by the petitioner but has been shown by respondent that the petitioner specifically sought relief in the civil suit against the compounding of any illegal construction of respondent no.4 by respondent no.2-Municipal

Council, Bikaner. Therefore, there appears to be no reason for permitting the petitioner to pursue the remedy in two courts and maintain the writ petition for the same cause for which the petitioner has already filed the civil suit and that suit is pending. The civil court has jurisdiction to examine all aspects of the matter including is an appropriate court to enquire into factual aspects of the matter by recording evidence. The trial court also has jurisdiction to look into the order passed by the Municipal Council during pendency of suit in which question whether the Municipal Council can compound the offence of illegal construction itself was already sub-judice.

Apart from above, there appears to be large number of disputed questions of fact involved in this writ petition which require thorough investigation. Some of the facts are that according to the petitioner, the scheme was framed for the entire area and the map was prepared and accordingly, plots were demarcated with a condition to leave the set-back. Respondent no.4 is purchaser of the plot and is bound by the condition which was already imposed before the sale of the plot. The above condition is seriously disputed by respondent no.4 on the ground that Annx. 1 is not an authenticated copy nor is a copy obtained from any authorities nor it contains the signatures of any authority and, therefore, the petitioner failed to prove that the set-back was a

condition imposed for the plots before their sale by the Gram Panchayat, therefore, it is sale of plot with condition. There are serious disputes about the nature of construction raised and also there is a serious dispute about the area which was to be covered and there is serious dispute about the nature of the plot which according to the petitioner is commercial and according to respondent no.4, is not as yet commercial. There are very many other aspects of the matter which can be looked into in civil suit because of the fact that the petitioner is also a person who had title to the various property jointly with Hullas and Atmaram. Under what circumstances and on what assurances, the properties were dealt with, are the questions which may have material bearing for grant of relief to the petitioner or for the purpose of denying the relief.

So far as contention of learned counsel for respondent no.4 that order dated 4.8.2004 (Ann.7) compounding the construction of respondent no.4 is appealable, it appears to not well founded in view of the fact that the order to compound the construction is passed under the specific rules, which are the Rajasthan Municipalities (Compounding and Compromising of Offences ) Rules, 1966 (for short “the Rules of 1966”), whereas the permission to raise construction is granted under Section 170 of the Act of 1959. It may be true that the order of

compounding may have relation with permission to construction but, at the same time, it is clear from Section 170 of the Act of 1959 as well as the Rules of 1966, that in case the construction is raised in violation to the permission granted under Section 170 of the Act of 1959 then those offences can be compounded as per the Rules of 1966. Therefore, the question of compounding may come subsequent to taking decision for grant of permission to raise construction. This Court is not inclined to examine whether the orders of compounding passed under the Rules of 1966 are revisional or not because of the reason that the revision may not be an effective and adequate remedy in the circumstances of this case.

In view of the above, this Court is not inclined to entertain the writ petition of the petitioner and all the questions raised by the petitioner with respect to the challenge to the action of the Municipal Council, Bikaner in compounding the construction of respondent no.4 by order dated 4.8.2004 (Annx.7) are left open to be decided by the civil court.

This Court, though is not inclined to entertain the writ petition so far as the relief is claimed by the petitioner for himself but a few glaring facts came to the notice of this Court during arguments and this

Court feels it necessary to bring all those facts to the notice of the State Authorities to give effect to the law laid down by the Hon'ble Apex Court in the case of K. Ravdas Shenoy vs. The Chief Officers, Town Municipal Council, Udipi and others (AIR 1974 SC 2177). The Rajasthan Municipalities act, 1959, as in force today, was enacted in the year 1959 which came into force with effect from 17.10.1959. The underlying purpose for enacting the Act of 1959 was that there should be uniform Municipal Law for the entire State of Rajasthan. The Act of 1959 was enacted so that there may be planned development of the area falling within the Municipal area and for that purpose, certain restrictions may be imposed for the larger benefit of the public in relation to construction activities. ( Apart from above, there are very many other reasons for enacting the Act of 1959 but they are not relevant at present). Hon'ble the Apex Court in the case of K. Ravdas Shenoy(supra) observed as under:-

> **" The Municipal Authorities owe a duty and obligation under the statute to see that the residential area is not spoilt by unauthorized construction. The Scheme is for the benefit of the residents of the locality.** The Municipality acts in aid of the scheme. The rights of the residents in the area are invaded by an illegal construction of a cinema building. It has to be remembered that a scheme in a residential area means planned orderliness in accordance with the requirements of the residents. If the scheme is nullified by arbitrary acts in excess and derogation of the powers of the Municipality the courts will quash orders passed by Municipalities in such

> cases.
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> The Court enforces the performance of statutory duty by public bodies as obligation to rate payers who have a legal right to demand compliance by a local authority with its duty to observe statutory rights alone. The scheme here is for the benefit of the public. There is special interest in the performance of the duty. All the residents in the area have their personal interest in the performance of the duty. The special and substantial interest of the residents in the area is injured by the illegal construction. (emphasis supplied)

The Hon'ble Apex Court also quoted :-

> "Lord Selborne in Maddison v. Alderson, (1883) 8 App Cas 467) said that **courts of equity would not permit the statute to be made an instrument of fraud."** (emphasis supplied)

Therefore, even if the petitioner in this case cannot get relief for himself but was successful in pointing out that despite enacting the law for planned development of the locality in the year 1959 ( after repealing several laws which were in force before that), the State Authorities either have not acted with all fairness to give effect to the provisions of law, as framed under the Act of 1959 or because of their inaction, the problem is becoming grave, grave and graver. The bye-laws which have been shown here in this writ petition, applicable for the Municipal Law, Bikaner etc., were published in Gazette on 23.2.1982. This Court feels it not necessary for narrating all the provisions made under the said bye-laws to show that how these bye-

laws are out-dated but finds tremendous force in the submission of the learned counsel for respondent no.4 when the learned counsel for respondent no.4 pointed out that clause (3) of Condition No.28 of the bye-laws is totally unworkable condition if it is not supported by any other orders passed under the Act of 1959. It is very strange that if the bye-laws as framed by the notification which was published on 23.2.1982, are only the bye-laws in force for granting permission to raise construction of the building in municipal area concerned then the authorities should examine again whether any locality can be developed by these bye-laws ?

This Court is further constrained to observed that this Court came across several cases where the provisions of the Rules of 1966 have been used by the local authorities only for the purpose of earning money by selling the necessary amenities to those persons who are involved in violating the entire scheme of the planned development of the locality.

Section 4 of the Rules of 1966 provides that offence punishable under the provisions of the Act of 1959 as well as under any rule or bye-law, made under the Act of 1959 except under Section 165(4), 194 and 203 shall be compoundable or compromisable.

Sub-rule (4) of Rule 4 of the Rules of 1966 provides that unauthorized constructions which offend against bye-laws, may be compoundable or compromised by the Board. Sub-rule(4) of Rule 4 of the Rules of 1966 reads as under:-

> "(iv) The unauthorized constructions which offend against bye-laws, **should not, as a rule, be allowed to stand,** but if however, it is considered desirable to condone such constructions on payment of compensation at the request of the party may be considered, and the compensation in such cases shall not be less than 25% of the cost of the unauthorized construction as may be considered on merits of each such case."

Sub-rule (4) of Rule 4 clears provides that the unauthorized construction which offend against bye-laws, should not, as a rule, be allowed to stand but it appears that the said rule is used only as a rule for compounding, not for holding that the unauthorized construction offending the bye-laws should not stand.

The authorities exercising powers under the Rules of 1966, probably understood that the language used in sub-clause (iv) of Rule 4 of the Rules of 1966 "but if however, it is considered desirable to condone such construction on payment of compensation at the request of the party may be considered ...." is a rule giving arbitrary power to compound the illegal construction which is not the correct position. The

word “desirable” also does not give them power to declare any and every illegal construction “desirable to condone.” The authorities are acting under totally mistaken belief, as no statute gives arbitrary power to any authority and this is to be understood by the authority whose action affects right of citizen to live in planned localities of any area in country. The words “on request of the party” and “on payment of compensation” used in above clause for compounding illegal construction are ancillary only. It has no relevance for the purpose of judging the '”desirability to compound” because of the reason that restrictions to regulate building construction activities affects the right of a owner of the property and restrictions restricting a person from using his own property are imposed so that he, against whom restriction has been imposed, may also get the benefit of living in healthy environment as a citizen of a City with proud. All persons are beneficiaries of their larger interest by sacrificing some of rights for enjoyment of their part of property. That sacrifice is also not without consideration. That sacrifice is for a consideration of sacrifice of all other residents of the locality of their right to enjoyment of their part of the property. Therefore, any compensation offered by any party in money is no compensation for condonation of breach of building bye-laws. Therefore, desirability for compounding of offence under the Rajasthan Municipalities (Compounding and Compromising of Offences)

Rules, 1966 must be desirability in fact and before compounding offences relating to violation of building bye-laws, the authorities should examine all aspects of the matter by specifically exercising whether property in question can be or could have been used without breach of restriction or not.

The learned counsel for the petitioner pointed out that the State Government issued an order dated 7.1.1965 (Annx.12) that it was brought to the notice of the State Government that the illegal constructions are being compounded on very poor or flimsy ground which should be avoided. There may be even subsequent order of the State Government but whether due regard is given to the Rules or not, is a matter of grave concern for the court and requires serious consideration by the State Government.

In view of the above, the entire subject matter is required to be considered by the State Government, therefore, a copy of this order be sent to the Secretary, (U.D.H.), Government of Rajasthan and the Director, Local Bodies for taking action on their part for making laws or making corrections in laws or for implementing the Municipal Laws in its true spirit so as to provide complete benefits to the public living under the municipal areas. The authorities should also see how far it will be

feasible to have uniform building bye-laws for municipal areas in the entire State of Rajasthan. If it cannot be, then can there be a classification of Municipal Board/Council/ and Corporation for having same bye-laws etc.

Since the writ petition of the petitioner is not entertained by this Court, therefore, the petitioner shall be free to prove his case before the civil court and the civil court may examine the case of the petitioner on merit and may also examine the order which has been passed for compounding of the construction of the petitioner, by not taking the order of compounding of the construction of respondent no.4 as the last word.

The writ petition of the petitioner is, therefore, dismissed with the directions and observations as mentioned above.

**( PRAKASH TATIA),J.**

mlt.